

Appl. No. : 10/067,569
Filed : February 5, 2002

Claims Rejections – 35 U.S.C. §§ 102(b)

Claims 1-3, 7-9 and 48 have been rejected under 35 U.S.C. § 102(b) as being anticipated by the disclosure of U.S. Patent No. 5,612,039 (“Policappelli”). Applicants respectfully traverse this rejection.

Applicants respectfully submit that Policappelli fails to teach every limitation of Claims 1-3, 7-9 and 48. *See* M.P.E.P. § 2131 (“To anticipate a claim, the reference must teach every element of the claim”). Claims 1 and 48 recite, *inter alia*, a detoxified extract from an agricultural by-product obtained as a result of processing a tropical crop. As explained in the specification at paragraph 0025, the terms “agricultural by-product” and “by-product” refer to plant products that are left over after separation of the main value product. For example, such by-products generally include the skin, mucilage, rind, shell and/or husk of the tropical crops.

The Office fails to point out where Policappelli teaches or suggests a detoxified extract from an agricultural by-product obtained as a result of processing a tropical crop. The Office had previously pointed to the disclosure by Policappelli of various ingredients such as grapefruit pectin and pineapple dry extract. However, Applicants respectfully submit that grapefruit pectin and pineapple dry extract are obtained from grapefruit and pineapple, respectively, not from by-products obtained as a result of processing those fruits. Therefore, since Policappelli fails to teach every limitation of Claims 1-3, 7-9 and 48, Applicants respectfully request reconsideration and withdrawal of this rejection.

Claims 1-9, 11, 17-29, 48-52, 58 and 59 have been rejected under 35 U.S.C. § 102(b) as being anticipated by the disclosure of U.S. Patent No. 6,572,915 (“Drunen”). Applicants respectfully traverse this rejection.

As an initial matter, Applicants note that Drunen was published on June 3, 2003 and thus is not prior art under 35 U.S.C. § 102(b). Therefore, Applicants respectfully request withdrawal of this rejection. Applicants note that Claims 1-9, 11, 17-29, 48-52, 58 and 59 were previously rejected under 35 U.S.C. § 102(e). In the event that the reference to 102(b) was a typographical error, Applicants respectfully request consideration of the following remarks.

The Office takes the position “that any[thing] that is toxic is considered an ‘unwanted constituent’ and would not be used in a composition for human consumption.” However, there is

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no indication that the extract employed by Drunen inherently contained a toxin. Applicants respectfully direct the Examiner's attention to the enclosed publication by Bucheli et al. (listed on the enclosed IDS). At page 1359, second column, Bucheli et al. state: "Nonripe and ripe [coffee] cherries contained only trace amounts of [Ochratoxin A] in the green coffee . . . and husk fraction..." Thus, contrary to the position taken by the Office, it is possible that the extract employed by Drunen did not contain any toxin. "The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic." M.P.E.P. § 2112(IV) (emphasis in original).

Assuming, *arguendo*, that the extract employed by Drunen contained a toxin, there is nothing in Drunen to indicate awareness that such a toxin was present, nor that the treatments employed by Drunen would have resulted in detoxification. Therefore, Applicants respectfully request reconsideration and withdrawal of this rejection.

Claims Rejections – 35 U.S.C. §§ 103(a)

Claims 10 and 49-52 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Policappelli. Applicants respectfully traverse this rejection.

The Office states: "If one of ordinary skill in the art were preparing an extract from an agricultural by-product for use in human consumption that may also contain a toxic component, it would have been inherent and obvious to remove the toxic portion by means of a detoxifying step." However, as noted above, Policappelli fails to teach or suggest a detoxified extract from an agricultural by-product obtained as a result of processing a tropical crop as recited in Claims 1 and 48. Likewise, Policappelli fails to disclose a process that involves obtaining a by-product from a tropical crop as recited in Claim 17. Assuming, *arguendo*, that Policappelli did disclose preparing an extract from an agricultural by-product (which it does not), it is possible that such an extract would not have contained any toxin. *See* Bucheli et al., discussed above. Applicants respectfully submit that there is no motivation to detoxify where there is no awareness that a toxin is present. Therefore, Applicants respectfully request reconsideration and withdrawal of this rejection.

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Conclusion

In view of the Remarks set forth above, Applicants respectfully submit that Claims 1-11, 17-29, and 48-52 are in condition for allowance, early notification of which would be appreciated. The Office is respectfully invited to contact the undersigned at the telephone number provided below with any questions regarding this application.

Respectfully submitted,

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